COURTNEY AYERS

IBLA 91-349 Decided March 5, 1992

Appeal from a decision of the Big Dry Resource Area Manager, Miles City, Montana, Bureau of Land Management, assessing penalties for trespass. M-79098.

Affirmed.

1. Rights-of-way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Revised Statutes Sec. 2477

   The question whether a public highway was established pursuant to R.S. 2477 is to be determined by reference to state law. BLM may decide whether an R.S. 2477 road exists if the efficient administration of the public lands requires such a decision to be made.

2. Rights-of-way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Revised Statutes Sec. 2477

   Construction of 1,000 feet of road across public land in October 1990 was done in trespass because no prior application for a right-of-way at the construction site was made and the road-builder failed to show that the 1,000-foot road was a public highway recognized pursuant to Montana law prior to the repeal of R.S. 2477 by the Federal Land Policy and Management Act of 1976.

APPEARANCES: Matthew W. Kneirim, Esq., Glasgow, Montana, for appellant; John C. Chaffin, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Courtney Ayers has appealed from an April 4, 1991, decision by the Big Dry Resource Area Manager, Miles City, Montana, Bureau of Land Management (BLM), that assessed trespass penalties totaling $874.88, for trespass on the public lands, pursuant to provisions of 43 CFR 2800. Appellant contends that the trespass, which consisted of construction of 1,000 feet of road to

provide an approach to a county road from land privately owned by appellant, did not require the grant of a right-of-way from BLM because the construction took place on an existing public road.

Appellant has requested a hearing in the event that this Board determines that "factual differences exist" (Statement of Reasons (SOR) at 12). The Board finds that the record provided, which includes photographs and maps of the vicinity of the road and statements from appellant, witnesses familiar with the road, and from BLM staff members who investigated this case, is sufficient to permit decision. So far as the operative facts are concerned, the record is without internal conflict. Consequently, no further fact-finding is required.

There is no disagreement that 1,000 feet of road was constructed by appellant on public lands in the Big Dry Resource Area located between Terry and Plevna, Montana, in Prairie County. Nor is it disputed that appellant had not submitted a written application for, nor been granted a right-of-way to construct a road at the site where the work was done in October 1990. See 43 CFR 2802.3, requiring that applications for grants of rights-of-way shall be filed on a form approved by the Director, BLM. Nonetheless, appellant argues that the construction was not done in trespass, because the 1,000-foot road was built on "a public highway under Montana law" (SOR at 11). Appellant explains his motive for building this road was to change the point of entry of his access road to the county road in order to establish entitlement to use a school at Plevna, Montana (SOR at 2-4). Since attendance at school was determined by reference to the junction of the farm access road with the county road, a small movement of the junction in the direction of the Plevna school made possible a change in school enrollment for appellant's children.

The 1,000-foot road at issue is part of an access road that runs from land owned by appellant across public land to connect to a graveled county road. According to a letter to appellant from the Prairie County Board of Commissioners, the access road was built by the county for appellant "[i]n the early 1970's, as a courtesy" (Letter dated Mar. 18, 1991, from Jens, Sackman, and Chapman, to Ayers). The last 1,000 feet before the road joins the county road has been moved two times. A report of a BLM field examination concerning the road project in sec. 3, T. 10 N., R. 54 W., Montana Principal Meridian, explains:

> Mr. Courtney Ayers has a ranch road to his house and ranch buildings and operation that crosses public lands. At the northeast end of the road where the ranch road intersects with the county road, Mr. Ayers has rerouted the last 1000 feet from the east end from a dogleg to the north to a slight dogleg to the south and east. * * * The new road segment is about 1000 feet in length and has been built to general specifications. The other two older road segments that exited on to the county road have been reclaimed by removing

> the built-up portions and filling the ditches, the area leveled and reseeded. Area surveyed: 18.29 acres.

(Field Examiner's Report dated February 25, 1991 (Will Hubbell)).

Appellant agrees that there have been three different approaches built covering the last 1,000 feet to the county road. He explains:

> There were three access roads in existence at the inception of this controversy. For purposes of simplifying the issues in this appeal, one of the roads was constructed by Prairie County road department in the early 1970's and was located so as to take a shorter route to Terry, Montana, which is the county seat of Prairie County, Montana. The other road was an older right of way also constructed by Prairie County a number of years before to assist the Ayers in moving large equipment to the County road from their ranch. This roadway was periodically used for access to the Ayers ranch and was open to the public. Further it was periodically bladed by "motor patrol" graders of Prairie County.

(SOR at 2).

This account omits mention of the third 1,000-foot segment of road, actually the first constructed portion of the Ayers access, as BLM points out in answer to the SOR, suggesting that one

> envision a three prong pitchfork, such as Neptune's trident. The center prong extends straight out from the handle. Each exterior prong curves out from the handle. The road from the appellant's home is the handle and center prong. * * * this center prong and the handle were the original road to appellant's home. * * * this prong is the road not discussed in detail in the appellant's Statement of Reasons.

(BLM Answer at 1).

The parties disagree concerning events leading to the commencement of the construction project. Appellant contends that he notified BLM that he would begin to construct a more southern junction with the county road across public land in October 1990, and was informed that "he could rework the existing roads but was not authorized to create new roads without prior approval of a right of way" (SOR at 3). Appellant supports this statement with an affidavit from his mother, stating that a BLM employee "told me Don Nelson of BLM had sent him out to tell Courtney that the BLM did not want a new road built but that we could rebuild an old road" (Betty Ayers' Affidavit dated May 21, 1991 (SOR Exh. C)).

Although the parties disagree about whether statements by BLM employ-ees authorized the road to be constructed, there is no disagreement that the road constructed was the southernmost prong of the fork described by the access road as it approached the county road, and that the 1990 construction was done immediately south of the original access provided to

the county road. Referring to two aerial photographs of the junction of the Ayers access road to the county road, BLM argues that Ayers has failed to provide any evidence that the latest access junction existed prior to 1976, or that there was ever public use or acceptance of the road prior to 1976.

That there should have been such a showing is crucial to the theory of this appeal as developed by appellant, since he contends that his construction was merely an improvement of an existing public highway that had been in existence prior to the enactment of the Federal Land Policy Management Act of 1976 (FLPMA). Section 706(a) of FLPMA, 90 Stat. 2793, effec-tive Oct. 21, 1976 repealed section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), R.S. 2477, which provided that "[t]he right of way for construction of highways over public land, not reserved for public uses, is hereby granted." When appellant argues that he had improved an existing public highway, and that therefore he needed no further permission from BLM, he is claiming the benefit of a prior existing highway right-of-way created pursuant to R.S. 2477.

[1] Although the Department ordinarily will not attempt to adjudicate whether an R.S. 2477 right-of-way has been created, because such a decision involves questions of state law, if the question whether such a right-of-way exists cannot reasonably be avoided in the ordinary course of administration of the public lands it must nonetheless be dealt with. See Leo Titus Sr., 89 IBLA 323, 335-36, 92 I.D. 578, 586 (1985); Nick Dire, 55 IBLA 151 (1981). In defense against the assessment of trespass penalties in this case, appellant has squarely raised the issue whether this 1,000-foot long road junction is an R.S. 2477 right-of-way. Because BLM rejected his contention that the road approach he built was a reconstruction of an existing public highway when the trespass penalty was assessed, we will examine the evidence he has offered to show that this road was a highway before 1976 when R.S. 2477 was repealed by FLPMA. If it was, there was no need for the grant of a right-of-way to accomplish the result already obtained by the operation of the 1866 highway law. Homer D. Meeds, 26 IBLA 281, 292, 83 I.D. 315, 320 (1976).

Appellant explains, concerning the 1,000-foot junction here at issue, that: "[T]he access road in question was originally built with Prairie County equipment to assist the Appellant's father (Newman Ayers) in moving large combine harvesters on and off the ranch. We surmise that all of this occurred prior to FLPMA's enactment in 1976" (SOR at 8). In support of this conclusion, appellant offers an affidavit from a former county employee that states:

> The question that I am being asked has to deal with a road approach that I built for Ayers before I retired. The actual construction took place many years before 1976. I am informed and understand that this same road approach is now the subject of a dispute between the Bureau of Land Management and Courtney Ayers and the Prairie County schools. I built roads, fire guards, road approaches, and car crossings for farmers and ranchers where ever

they requested this work to be done everywhere I worked in Prairie County. It was the policy of the commissioners to help farmers and ranchers with their road problems and to help them maintain their access to their farms and ranches.

> I retired from my work in 1968. I think Harold Schied took over my work when I retired. I have done a lot of work for Newman Ayers including making the above described road approach to move a combine from one ranch to the other. [Emphasis in original.]

(Affidavit of Emanuel Spidel dated May 22, 1991 (SOR Exh. G)).

Another affidavit by a county employee states that "I recall seeing the road that was improved by Courtney Ayers in the fall of 1990, which in my opinion was in existence prior to 1976" (Affidavit of Harold Schied dated May 24, 1991 (SOR Exh. H)).

Relying on aerial photographs of the construction site taken between 1958 and 1977, appellant concludes that the road junction constructed to permit movement of farm machinery was "in existence and used prior to the enactment of FLPMA in 1976" (SOR at 9). Paraphrasing State v. Auchard, 55 P. 361 (Mont. 1899), appellant argues that the junction was "open to the public, used by the public and maintained by local entities" and concludes that "[t]his makes the roadway a public highway under Montana law" (SOR at 11).

[2] Whether a road is a public highway is a question determined by application of state law. Leo Titus, Sr., supra. Assuming that the junction at issue was first constructed not later than 1968, but after 1965, we would look to a Montana statute enacted as sec. 2-101, Ch. 197, L. 1965, when Montana law defined "public highways" to mean

> all streets, roads, highways, bridges and related structures which have been or shall be:
>
> (a) built and maintained with appropriated funds of the United States or the state or any political subdivision thereof;
>
> (b) dedicated to public use;
>
> (c) acquired by eminent domain;
>
> (d) acquired by adverse use by the public, jurisdiction having been assumed by the state or any political subdivision thereof.

(60-1-104(22) Montana Code Annotated (MCA) (1983)).

Since there is no suggestion that the Federal lands on which this road junction was built were acquired by eminent domain, and because appellant does not contend Federal highway funds were used for the project, he

must show that either there was a dedication to public use of the project or that it was acquired by adverse use by the public, jurisdiction having been assumed by the State. 60-1-104(22)(b) or (d) MCA (1983). In apparent recognition of this requirement, appellant has offered Exhibit E, a letter dated March 18, 1991, to him from the Prairie County Board of Commissioners, stating the they "are researching county records to determine if the road that you have constructed is, in fact, on the location of a pre-existing public road."

The case file contains a sequel to this correspondence, dated March 21, 1991, addressed however to BLM, from the same group of commissioners, that recites:

> [W]e have consulted with Gladys Helen Young of Prairie Abstract & Title. Also, we researched the county gas tax maps. In addition we talked with Norman Schied, who was a Prairie County road employee from 1957 until well into the 1980's.
>
> Mrs. Young could find no easement or agreement regarding a road in the area we discussed. Our gas-tax maps do not have any such road on them. Mr. Schied has no recollection of such road being constructed. He does, however, remember a different route being constructed, which has nothing to do with the road in question, being built in the early 1970's.
>
> Therefore, we conclude that we have no information or records that would identify the road in question as once being a county road.

(Letter dated Mar. 21, 1991, from Jens to Swogger).

On the record before us, therefore, it does not appear that this section of roadway could have become part of a public highway in 1965 or later, since there is no record that it was ever dedicated to public use or acquired for public use as required by Montana law. 60-1-104(22)(b) and (c) MCA (1983).

Assuming that the junction was first constructed at some time earlier than 1965, however, does not produce a different result. First of all, appellant has provided no evidence that there was any use of the junction prior to enactment of the current Montana statutory law on the subject in 1965. Appellant seems to assume that there was such proof, however, and quotes from State v. Auchard, supra, arguing that

> if the road had been used and traveled by the public generally as a highway, and is treated and kept in repair as such by the local authorities whose duty it is to open and keep in repair public roads, proof of these facts "furnishes a legal presumption, liable to be rebutted, that such road is a public highway."

(SOR at 11).

The Auchard decision disposed of an appeal by the State from a directed acquittal of a defendant charged with the crime of obstructing a public highway. The State Supreme Court affirmed the ruling of a dis-trict judge that evidence produced at trial had not proved the road block was placed on a public highway. The court concluded that the State had not shown a sufficient observance of Montana law respecting the establishment of a public highway to prove that the way obstructed was a public road. Concerning compliance with a statute in effect in 1898, the court held that "in the steps taken between the filing of the petition and the final order, there was a material departure from the mandatory provisions of section 1810, which requires notice of the place, as well as the time, where the viewers will meet to view and mark out the road, to be posted, and that proof thereof shall be made by affidavit." Id. at 55 P. 362. The language quoted by appellant appears when the court is considering an argument advanced by the State that, despite failure to comply with the necessary statutory requirements to establish a public highway, adverse use of the road had established it as a public way.

Rejecting this argument, the court found "[t]here was not evidence of the adverse use of the way obstructed by defendant sufficient to go the jury." Id. The court described the evidence of use:

> One witness testified that he had traveled the road "off and on" for several years; and another said he had seen the road, and "had frequently passed through there" for 18 or 19 years, and that the obstruction was in the "regular traveled road," or "where the road had been traveled." Manifestly this, of itself, is not proof that the road was open to the public generally, and was traveled by them during the period prescribed by the statute. Neither does the evidence show that the road had been kept in repair by the county, or that any money had been expended upon it.

(55 P. 362).

The case made by appellant in this appeal is similarly weak. He has shown that, at some time before 1976, an alternate approach to the county road was built that was sufficient to permit him to move some field equipment from one field to another. This was apparently the purpose for this route until 1990, when it was improved to provide the sole access to his house so that his children could be moved to another school district. While it appears that some initial assistance in the creation of this approach to the county road was provided by the county, it is not clear that this assistance amounted to construction of a road or even that it materially assisted the 1990 construction. Whatever was done earlier was sufficient to permit passage of a field machine. There is no showing that the approach was used except casually for moving field machinery until 1990, when appellant built an approach suitable for his general use at his own expense. He has not shown how this activity amounts to the creation of a public highway under Montana law. See generally Ewan v. Stenberg,

541 P.2d 60, 63 (Mont. 1975) (occasional use by hunters, friends, and neighbors not sufficient to establish a public highway). Accord Homer D. Meeds, 26 IBLA at 298, 83 I.D. at 323.

In an appeal to this Board, the burden of proof to establish that a decision by BLM was made in error rests with the appellant. He must establish, by a preponderance of the evidence of record, that there has been an error, as alleged. See generally In Re Mill Creek Salvage Timber Sale, 121 IBLA 360 (1991); Leon F. Scully, Jr., 104 IBLA 367 (1988). Appellant has failed to show that the movement of his point of entry onto the county road coincided with a prior public highway right-of-way so that he was excused from compliance with the requirements of 43 CFR part 2800 sanctioning the creation of rights-of-way across the public lands. The BLM decision assessing penalties for construction by appellant of a road in trespass on the public lands must therefore be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge